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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1651

UNITED STATES RAILWAY ASSOCIATION,

Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CERTAIN UNITED STATES REPRESENTATIVES

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The undersigned United States Representatives respectfully move this Court for leave to file the accompanying brief *amicus curiae*. This brief will also be circulated to all Members of the House of Representatives prior to a motion by *amici curiae* to participate in oral argument. The attorneys for all

parties except those representing the Government have consented to the filing of this brief.

Applicants have an interest in this case as members of the national legislature who participated in the legislative process which led to the enactment of the Regional Rail Reorganization Act, (hereinafter referred to as the Rail Act), 87 Stat. 985, P. L. 93-236 (1974), the constitutionality of which is in question. They have a direct and immediate interest that the intent of the Congress in passing this law be accurately and properly presented to this Court. Moreover, the *amici curiae* have a direct and immediate interest and responsibility for the continuation of rail service and a responsibility to protect the interest of the tax paying public, an interest which differs from the Government agencies and creditor interests represented before the Court in this litigation.

The basic issue presented in the case is whether or not the Rail Act is constitutional without reference to the Tucker Act, 28 U.S.C. 1491 (1970). We disagree with the concessions made by the Government parties before the lower court that, without the present availability of a Court of Claims remedy, the Rail Act would be unconsitutional as to the appellees. See Joint Appendix (J.A.) 42-43. We also disagree with the argument of the appellees that the Act fails to provide sufficient constitutional compensation for interim erosion pending final implementation of the process and, thereby, contravenes the Fifth Amendment of the United States Constitution.

We maintain that the process of the Act is a constitutional exercise by the Congress of its powers under the Bankruptcy Clause and the Commerce Clause of the Constitution (Art. I, Sec. 8, cl. 4 and Art. I, Sec. 8, cl. 3). Furthermore, there is no showing that the reorganization process provided in the Act will cause an unconstitutional taking of the property of the appellees either during the period of reorganization or thereafter.

This is not an ordinary reorganization case where the debt structure of the bankrupt is simply restructured. The bankrupt Penn Central Transportation Company, together with other similarly situated railroads in the United States, constitute a vital public service for the Nation. After lengthy debate, the Congress created a system whereby certain rail properties of the bankrupt estates were to be reorganized, with the estates to retain the ownership interest in the property, and the Government to provide benefits in a total of more than $2 billion to make the reorganization process successful. The question of whether or not the bankrupt estates would be entitled to an additional open-ended deficiency judgment against the United States was specifically considered and rejected by the Congress.

We consider it essential to the integrity of the legislative process that the specific intent of the law as passed be upheld and, therefore, the *amici curiae*

respectfully request this Court to grant permission to file the annexed brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Some of the *amici curiae* are United States Representatives who participated in the development of the Regional Rail Reorganization Act of 1973 (hereinafter referred to as the Rail Act). Some were involved in the original drafting of the bill; others were Managers

on the Part of the House in Conference Committee, or participated in the final approval of the Conference Report which became Public Law 93-236. Many of the *amici curiae* represent constituents who are directly dependent on the continuation of adequate transportation service. If the Rail Act should fail, the cessation or significant curtailment of rail service will cause unemployment, disruption of public services, environmental damage, and immediate economic hardship to their constituents. All of the *amici curiae* have a vital interest in upholding the intent of the statute that vital public rail service should be continued at the lowest reasonable cost to the Federal tax paying public.

Our interest can be stated simply and directly: it is our opinion that none of the parties before this Court have accurately described the intent of the Congress in enacting this law. The constitutionality of the Rail Act has been challenged on the grounds that it is violative of the just compensation provisions of the Fifth Amendment to the United States Constitution. The governmental parties argue that the Rail Act is consitutional because of an implied Tucker Act remedy. (The Tucker Act is codified at 28 U.S.C. §1491 et. seq. (1970)). The appellee creditors argue that the Rail Act is *un*constitutional because of the *absence* of a Tucker Act remedy.

We disagree with *both* parties on this point. There is no evidence in the legislative history that Congress intended to afford Tucker Act relief, and much evidence to the contrary. We disagree with the government parties to that extent. On the other hand,

we forcefully maintain that the absence of Tucker Act relief does not render the Rail Act unconstitutional and therefore disagree with the argument of the appellees. We particularly disagree with the concession by counsel for the Government that absence of a Court of Claims remedy renders the Act unconstitutional. (J.A. 42-43).

In the course of the legislative process, the Congress was required to balance many conflicting interests, including those of the creditors and of those certain governmental agencies who are before this Court. In addition, the Congress was required to weigh the interests of the general public, local governments, communities, shippers, the competing modes of transportation, and the interests of the Federal taxpayers, none of whom are specifically represented before this Court.

If a Tucker Act remedy is declared to be necessary to continue rail service in the Northeastern portion of the United States, it is the tax paying public of the United States, represented by all of the *amici curiae*, who will be called upon to pay any deficiency judgment assessed against the United States Government.

OPINION BELOW

The opinion of the three-Judge court below has not yet been reported. The opinion is reproduced in the Joint Appendix (J.A.) to the briefs of the Appellants and Appellees at pages 9-83.

JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. §1253 (1970). Notice of appeal was timely filed on July 17, 1974, by attorneys for Defendant United States Railway Association. Additional notices of appeal have also been timely filed by other parties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Bankruptcy Clause of the Constitution, Art. I, sec. 8, cl. 4, provides:

> The Congress shall have Power . . .
>
> * * *
>
> To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

The Commerce Clause, Art. I, sec. 8, cl. 3, provides:

> The Congress shall have power . . .
>
> * * *
>
> To regulate Commerce . . . among the several States . . . .

The Fifth Amendment to the Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Regional Rail Reorganization Act of 1973 is set forth in the Joint Appendix at 391.

The Tucker Act, 28 U.S.C. §1491 (1970), provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> (1) Founded upon the Constitution . . . .

QUESTIONS PRESENTED

1) Does the Regional Rail Reorganization Act during the reorganization period unconstitutionally erode the assets of the bankrupt estate unless a Tucker Act deficiency judgment is now declared to be available to appellees?

2) Does the Regional Rail Reorganization Act, requiring an exchange of rail assets for securities between the bankrupt estate and a government assisted private corporation, constitute an unconstitutional taking of property unless a Tucker Act deficiency judgment is now declared to be available to the appellees?

STATEMENT

In a very important sense, this is not an ordinary brief *amicus curiae*. We believe the government attorneys and the private parties have misconstrued the basic intent of the statute. This statute was never intended to be a taking of private property by the United States Government. Rather, it was an attempt to

build on the principles of private reorganization outlined by this Court in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970). It was necessary to provide a private enterprise reorganization partner (where none could be found) and provide financing (where none existed) so a reorganization process could occur.

The new private enterprise reorganization partner, to be known as the Consolidated Rail Corporation (hereinafter referred to as ConRail), would give *all* of its original stock and securities to the bankrupt estates in exchange for certain rail assets owned by those estates; the rest of the assets of the estates (rail and otherwise) would be left in the original reorganization courts under section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1970), hereinafter referred to as Sec. 77 proceedings. The original reorganization courts would thus have available for each estate the ConRail securities, abandoned rail properties, non-rail assets, and as much as $500,000,000 in government guaranteed securities from a government-assisted financing organization to be known as the United States Railway Association (hereinafter referred to as U.S.R.A.)

ConRail is a private corporation, and therefore, this reorganization would be between private parties. A consolidated court proceeding under the Rail Act sec. 209(b) is authorized so that several bankrupt estates in the same condition can combine parts of their rail assets before a Special Court, which will exchange these rail assets for *all* of the ConRail securities. The Special Court will thereafter divide these securities among the respective bankrupt estates. In addition to leaving this

beneficial ownership of the rail assets in the bankrupt estates, the Rail Act provides substantial benefits to the estates, including the Penn Central Transportation Company estate (hereinafter referred to as The Estate). These benefits include the $500,000,000 in government-guaranteed securities referred to above; $85,000,000 in cash grants and $150,000,000 in loan guarantees to prevent erosion during the reorganization process; $250,000,000 in labor protection payments; $500,000,000 in government guaranteed loans for ConRail plant improvements; $180,000,000 for rail service subsidies; and $500,000,000 in government guarantees to the National Railroad Passenger Corporation to finance by lease or purchase the acquisition from ConRail of the rail corridor from Washington, D.C. to Boston. This totals $2,165,000,000 in government assistance.

Finally, the Act provides that if for any reason the process has not worked as planned, the Special Court can order a deficiency judgment against ConRail in favor of the debtor estates. This gives the debtor estates the ultimate right to have the ConRail properties improved by the massive government assistance subjected to a judicial sale, with the proceeds distributed to the estates.

The reorganization process of the Rail Act thus provides an orderly process for distributing beneficial ownership of the transferred rail assets among the original owners, with expedited disposal of rail properties not to be included in the system. The

payment of potential labor claims, cash operating subsidies, and money to maintain the rail properties until ConRail acquires them, protects the value of the rail properties during the reorganization. The Rail Act does not interfere with the regular ongoing section 77 process of restructuring the remaining assets of the estates. Thus, the bankruptcy courts can proceed to deal with each estate in the traditional manner.

SUMMARY OF ARGUMENT

We wish to urge upon the court three fundamental propositions:

1) The Act provides a constitutional reorganization process for the Estate since the exchange of all of the stock and securities of Conrail (Rail Act Sec. 301-304), plus additional governmental benefits for the transferred properties of The Estate, leaves the bankrupt estate with more valuable property interests than it originally possessed;

2) The United States Government should not now be constitutionally required to assume any additional liabilities to The Estate beyond those provided in the statute for any losses incurred by The Estate during the reorganization process;

3) No deficiency judgment against the United States is provided for in the Rail Act and such a declaratory finding by this court is not necessary to establish the constitutionality of the Rail Act.

We do not agree with appellee creditors that the Act is unconstitutional on its face. Neither do we agree with the position of the appellee that a Tucker Act remedy

providing for a deficiency judgment against the United States is necessary to provide a constitutionally fair and equitable process for The Estate under the Rail Act, either with regard to any interim losses or the final exchange of Estate rail properties for securities of Conrail.

ARGUMENT

THE REORGANIZATION PROCESS PROVIDED IN THE RAIL ACT IS A CONSTITUTIONAL EXERCISE OF THE COMMERCE AND BANKRUPTCY POWERS OF THE CONGRESS

From the beginning of the Congressional consideration of this problem, it was clear that the traditional regulated private system of railroads in the Northeast was no longer functional and that the separate traditional court reorganization proceedings under section 77 of the Bankruptcy Act were not capable of ever bringing most of the debtor railroads in the Northeastern section of the United States out of bankruptcy.

The Congress was aware of the statement of the Third Circuit that a reappraisal of the factors to be considered in modern rail bankruptcies might be beyond the faculties of a court. *In re Penn Central Trans. Co.*, (3rd Cir., June 14, 1973), cited by the Report of Committee on Interstate and Foreign Commerce, H.R. Rep. No. 93-620, 93rd Cong., 1st Sess., Nov. 3, 1973 at 29. The Congress has created a

system to solve this very difficult problem. The Congressional judgment on what is a reasonable and responsible approach is entitled to substantial weight in this court and should be followed if there is a likelihood it will accomplish its purpose. *Oklahoma v. Guy Atkinson & Co.*, 313 U.S. 508, 527, 533 (1941).

At all times the Congress was trying to create a constitutional reorganization following the process outlined by this court in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970). As indicated by legislative history, this reorganization process was used as a model for the Rail Act. 119 Cong. Rec. H9731-32 (daily ed. Nov. 8, 1973). This legislative history also shows that the Congress did not intend for the Government to take any property from the debtor estate, but rather to provide a reorganization partner (where none could be found) and provide financing (where none existed) so a reorganization process as outlined in the *New Haven Inclusion Cases* could occur.

In the *New Haven* case, the reorganization court approved a plan under which the bulk of the consideration paid to the estate of the bankrupt New Haven Railroad was in the form of Penn Central stock. Under this plan, the issuer of the stock was required to underwrite its value. If the stock did not attain a per share value of $87.50 within 10 years of its issuance, then the Penn Central was to become liable in cash for the amount by which the mean market value of the stock for a 30-day period at the end of the 10 year period fell short. Based on the record before the reorganization court at the time of the order, this Court expressed its approval of the plan. The intervening

bankruptcy of the Penn Central, however, caused this Court to remand for further proceedings. *New Haven Inclusion Cases*, 399 U.S. 392, 483-89 (1970).

The method of compensation provided by the Rail Act can be compared favorably with the plan approved in the *New Haven* case: First, under the Rail Act, *all* of the initially issued securities of Conrail would be issued to the estates of the debtor railroads, whereas the New Haven received only a portion of the publicly traded stock in the Penn Central system. Second, the Rail Act confers a package of benefits on Conrail to help assure its success, including planning, subsidies, labor protection, and expedited abandonment, whereas the new Penn Central Company received no government aid. Third, the Rail Act gives the debtor estates the right to a deficiency judgment against Conrail for the amount necessary to make the conveyance fair and equitable, whereas the New Haven Reorganization Court made Penn Central liable only for the shortfall in the mean value of the stock at the end of a ten year period. Finally, although the Rail Act contains no provision for a *government* guarantee of the value of the stock, neither did the plan approved in New Haven case. Rather, the guarantee of the value of the stock was by the *issuer* of the stock. A similar provision could if necessary be provided by the Special Court as part of this statutory process to give proper value to the bankrupt estates. Finally, if Conrail should fail (as did the Penn Central) the Special Court can enter a deficiency judgment against Conrail.

It has been objected that such a deficiency judgment against Conrail would be "circular" or "illusory," and

that it would further depress the value of the securities issued by Conrail. Yet the same argument could have been raised against the *New Haven* plan – the cash liability on the Penn Central at the end of the ten year period could well have further depressed the value of its stock. Nevertheless, this Court approved that plan. The statutory scheme of the Rail Act is therefore within the rationale of the *New Haven* case.

A future deficiency judgment would not be a judgment against the equity in Conrail held by the debtor estates. Rather, it would be a judgment against Conrail's assets, which will include the rail properties increased in value by the government benefits made available as part of this reorganization. If such a deficiency judgment should endanger the viability of Conrail, the Congress might be faced with a decision whether to permit the partial or total liquidation of Conrail or instead to appropriate funds sufficient to support Conrail as a continuing concern. In that event, the decision may be made by Congress when and if the necessity arises, but not before.

THERE IS NO UNCONSTITUTIONAL EROSION OF CREDITORS' RIGHTS DURING THE PERIOD REQUIRED TO COMPLETE THE REORGANIZATION PROCESS

There is no question that a secured lienholder's interest in an immediate judicial sale may be subordinated by Congress to the overriding public interest. *Reconstruction Finance Corp. v. Denver & Rio Grande Western R. Co.*, 328 U.S. 495, 535-36 (1946). Nor is there any question that the public interest can require a continuation of rail service which may cause losses to the secured creditors. In the *Penn Central Inclusion Cases*, 389 U.S. 486, 510-511 (1968) this Court stated the proposition as follows:

> While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders whose interests may or may not be served by the destructive move.

In the *Penn Central Inclusion case, supra*, and two years later in the *New Haven Inclusion Cases* 399 U.S. 392, 492 (1970), this Court quoted with approval the following statement by the Interstate Commerce Commission:

> [I]t is a fundamental aspect of our free enterprise economy that persons assume the risks attached to their investments, and the N[ew] H[aven] creditors can expect no less because the N[ew] H[aven]'s properties are devoted to a public use.

The lower court opinion indicates the Act is unconstitutional because it requires continued operation of service and prohibits abandonment of rail lines during the limited reorganization period and this cannot be done under the doctrine announced in the case of *Brooks Scanlon v. Railroad Commission*, 251 U.S. 396 (1920). See also *In. Re. Penn Central Trans. Co.*, 494 F.2d 270 (3rd Cir. 1974), *petition for cert. filed* 42

U.S.L.W. 3633 (May 8, 1974). To the contrary, we maintain that the present bankruptcy powers of the government, as set forth in section 77 of the Bankruptcy Act, allow the courts to require creditors to suffer reasonable losses incident to a reorganization.

The Congress may use methods other than a judicial sale to give creditors the value of their claims. In *Wright v. Union Central Life Insurance Co.*, 311 U.S. 273 (1940), this Court upheld a statute which imposed a three-year moratorium on the mortgagor's right to foreclose, subject to payment of reasonable rent, and gave the former debtor the right to buy the property at its appraised value at the end of the moratorium. This type of relief can be decreed by the courts in this case if it is deemed necessary.

When the facts and the alternatives available are examined it becomes clear this statute is a rescue operations for all concerned and not an arbitrary use of government power.

First, the fact that the Penn Central Transportation failed; that there have been continuing losses in the section 77 bankruptcy proceedings; and that there is no viable buyer for the operating properties has not been caused by the Rail Act.

Second, the estate will be required in any event to continue operations under the Interstate Commerce Act. 49 U.S.C. sec. 1(18). In the *New Haven Inclusion Case, supra*, this Court affirmed the proposition that "in the event of a liquidation, New Haven would have been obliged to obtain a certificate from the Commission pursuant to sec. 1(18) of the Interstate Commerce Act." 399 U.S. 392, 461 (1970). See also:

Thompson v. Texas Mexican R. Co., 328 U.S. 134, 144 (1946). There are also many state statutes requiring continuation of public service. *Palmer v. Massachusetts* 308 U.S. 79 (1939), *In re. Central Ry of New Jersey*, 485 F.2d 208 (3rd Cir. 1973). If this court disapproves the reorganization rescue operation authorized by the Act the time spent by the estate in attempting to close down operations will be far longer than under the expedited abandonment provided in sec. 304 of the Act. The present abandonment procedures require the ICC and the courts to balance the public interest against the individual creditor's interest in abandoning and liquidating the rail properties. We suggest that history shows that the existing process is far longer and more difficult than those provided in the Act.

Third, the Congress was well aware of the conditions which the trustees deemed necessary as outlined in testimony by Mr. Jervis Langdon, the spokesman for the trustees of the estate. See Hearings, Subcommittee on Transportation & Aeronautics, House Committee on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. Serial No. 93-30 at page 248 Apr. 16, 1973. The lower Court accepted these identical areas of change in its opinion (J.A. 127) and indicates the solution presented by the Rail Act has a strong presumption in its favor, for practical as well as legal reasons (J.A. 131-32).

The Congress in creating the Rail Act not only followed the legal model set forth by the Supreme Court in *New Haven Inclusion Cases, supra*, but also carefully tailored this statute to meet the specific problems of the Penn Central estate by:

1. Providing for a reduced total rail system. Rail Act sec. 206 and 304.
2. Providing for Government support for lines not necessary to the reduced system. Rail Act sec. 402, 403.
3. Providing for takeover of Northeast corridor rail services by Amtrak and for rail line subsidies to State and local authorities. Rail Act sec. 206(a)(3), 206(c)(1)(C), 210(b), 304 and 402.
4. Providing for direct Federal grants in the amount of $250,000,000 to employees who may be displaced by the reorganization. Rail Act sec. 501-509.
5. Providing assistance for interim deferred maintenance and future upgrading and modernization of the rail system. Rail Act sec. 215, 210(b).

One need only examine the alternatives available to the estate, and it becomes clear the process is "fair and equitable" and provides the only hope for the estates which otherwise must continue suffering erosion as losses mount. This erosion cannot be recovered in liquidation because the estates will eventually be required to sell the properties piecemeal at individual "fire sales" which cannot help but bring lower and lower prices.

It would seem that some creditor appellees hope and expect that if they can destroy the Act, they will force the government to nationalize the Penn Central which they hope would require the rail properties to be taken under eminent domain principles which might result in a greater cash return for them. One of the purposes of this brief *amicus curiae* is to indicate the strong resistance which exists in Congress to paying any additional amounts of government money to these estates beyond that provided in the Act.

THE RAIL ACT IS CONSTITUTIONAL WITHOUT REFERENCE TO THE TUCKER ACT

While we agree with the main contention of the Appellant Government Agencies that the Rail Act is fair and equitable and does not amount to an unconstitutional Fifth Amendment taking, we do differ with their contention in the alternative that the possibilty of a future Tucker Act remedy can affect the constitutionality of the Act itself. We contend that the Act must be construed as constitutional, without such reliance upon the Tucker Act. The Tucker Act was not considered by the Congress in creating the Rail Act. It is a jurisdictional statute often used to settle private claims that was neither repealed, nor engrafted onto the Act to create a possible deficiency judgment against the government.

The Tucker Act, 28 U.S.C. 1491 (1970), waiver of the sovereign's jurisdictional immunity was enacted to provide adequate opportunity for expeditious and orderly determination of claims against the government. The Tucker Act deals with the five limited areas of liability to which the government consents. The five areas do not purport to deal with the upholding of other Acts of Congress. This Court has never relied upon the presence of the Tucker Act to uphold the constitutionality of another Act of Congress.

The logic employed in attempting to argue that the Rail Act is constitutional because of a potential Tucker Act remedy is indeed strained. Each and every act of Congress of a similar nature, irrespective of the amount of authorization or the process provided for in any such

act, could be constitutionally upheld on the grounds that a future Tucker Act remedy might be invoked. The intent of Congress in passing the Tucker Act was not to insure the constitutionality of potential unconstitutional laws and such a precedent would be very dangerous.

The Tucker Act remedy in such cases as *United States v. Causby* 328 U.S. 256 (1945), and *Hurley v. Kincaid*, 285 U.S. 95 (1932), is based upon a lawful government action inadvertently causing injury to a private party which gives rise to a cause of action in the Court of Claims. Such a lawful action by the Government may result in an "implied taking," i.e., low-flying airplanes or flooding of property. In any of these cases, however, the original statutory action was proper, i.e., flying military airplanes or carrying out a flood control project. As in those cases, the process created by the Rail Act is proper exercise of Governmental power and in addition it provides a procedure for the Special Court (similar to the Court of Claims procedure) to correct any inequities arising because of the original transfer of the rail assets to Conrail. This can involve a deficiency judgment against Conrail or valuing the assets as of the effective date of the Rail Act.

The House bill originally defined "fair and equitable value" as either the fair liquidation value or the going concern value as of *September 30, 1973*. H.R. Rep. No. 93-620, 93d Cong., 1st Sess., at 2 (1973). This definition, modeled on the definition adopted by the trial court in the *New Haven Inclusion Case, supra*, 399 U.S. at 492, was designed to protect the creditors from the effects of continued erosion of the bankrupt

estates. The designation of this cut-off date in the statute itself was not in the Senate bill. The Conference compromise adopted instead a standard of "fairness and equity" applicable to the approval of a plan of reorganization, or a step in such a plan as contemplated under section 77 of the Bankruptcy Act.

The report of the Conference Committee does not explain the reasoning behind this compromise. See H.R. Conf. Rep. No. 93-744, 93rd Cong., 1st Sess. at 58-59 (1973). Whatever the reason for the substitution, nothing in the statute as finally enacted, nor in its legislative history, precludes the special court from incorporating a cut-off date into its finding so that the conveyance of rail properties is fair and equitable within the meaning of section 77. In fact, the documented reliance of the Congress on the approach of the *New Haven* case would appear to support the proposition that the concept of judicially determined cut-off date was incorporated into the statutory standard. This recognizes that such a designation is better left to the judicial process after the facts have been established. Establishment of a proper date involves a traditional function of the Federal Judiciary, in that the court must apply the Constitution and the laws of the United States to the specific facts of each case.

The Special Court, having been clothed with the powers of a section 77 reorganization Court by Section 209(b) of the Act, would clearly have the power to determine the point at which the erosion of the debtor estate reached unconstitutional levels, and to set the fair and equitable value of the rail properties at that

date. After setting the cut-off date, the Special Court also has the power under Sec. 303(c)(2)(B) of the Act to order an increased allocation of the government-guaranteed obligations of the U.S.R.A. to the estates if necessary. The Act authorizes up to $500,000,000 in obligations of U.S.R.A. for this purpose. It cannot now be said that this amount is unreasonable on its face.

To the contrary, it is possible that the extent of erosion has been over-stated by many of the interested parties. In this connection, reference is made to the Interstate Commerce Commission Report to Judge Fullam on October 1, 1973. The Commission stated its belief that the Penn Central was financially able to continue its railroad operations through the first quarter of 1974, and probably through the remainder of 1974. The Commission was unable to determine the erosion of traffic alleged by the Trustees. A number of factors suggested to the Commission that the company's traffic erosion had largely stabilized. See *Penn Central Transportation Company Reorganization,* I.C.C. Finance Docket No. 26241, Sept. 28, 1973 (slip opinion at 87, 88-89), and I.C.C. Release No. 193-73, Oct. 1, 1973.

The result of the above-stated reorganization process is to create a valuation system which amply protects the creditors from interim erosion. The Court of Claims may some day have another theory but there is no question that in considering the process under this Act the 93rd Congress, specifically the House of Representatives, rejected giving the Federal Courts the key to the Treasury which would result from an open-ended deficiency judgment against the United States. The

legislative history of this Act is emphatic in restricting the total amount of funds to be used in carrying out the reorganization process authorized by the Act.

> [Mr. Dan Kuykendall] Will the gentleman give us his interpretation of the guarantees we have to keep that [giving the Federal courts the key to the Treasury] from happening in the court proceedings?
>
> [Mr. Brock Adams] Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way it is spent, is to be approved by an act of Congress, to be signed by the President.

Colloquoy between Reps. Adams and Kuykendall, Managers on the Part of the House, at 119 Cong. Rec. H-11876 (daily ed., Dec. 20, 1973), quoted in the Opinion of the three-Judge court, J.A. 49-50. The full colloquoy is set forth in Appendix A of this Brief.

The court should *not* at this time consider the availability of a future Tucker Act remedy in considering the constitutionality of the Rail Act. Any Tucker Act remedy must be based upon the facts which show an implied taking or improper erosion of creditor rights if and when the matter is presented to the Court of Claims. Any potential Tucker Act remedy is, therefore, not before this Court. If this Court should

decide at this time that a mechanism of a deficiency judgment against the United States under the Tucker Act is necessary to make this Act constitutional, the the Act must fall since the legislative history and the language of the Act are clear that no deficiency judgment against the U.S. is authorized by the Act.

CONCLUSION

The order of the three-Judge court granting injunctive relief should be reversed and the declaratory judgment set aside.

Respectfully submitted,

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APPENDIX A

Excerpt from floor debate in House of Representatives, December 20, 1973, 119 Cong. Rec. H11876 (daily edition):

Mr. ADAMS. Mr. Speaker, will the gentleman yield?

Mr. STAGGERS. Mr. Speaker, I yield to the gentleman from Washington, a member of the committee on conference.

(Mr. ADAMS asked and was given permission to revise and extend his remarks.)

Mr. ADAMS. Mr. Speaker, I think the chairman of the conferees and the gentleman from Tennessee have explained the bill very well. I just want to confirm with the chairman that the conferees did reach an agreement on the meaning of section 206(i) of the act, particularly with regard to the fact that the association does not have authority to recommend any form of Federal guarantee of corporation stock.

Mr. STAGGERS. Mr. Speaker, the gentleman is correct. The conferees agreed that the planners of the association do not have the authority to recommend and plan the Federal guarantee of the value of corporation stock under section 206(i) of the bill.

Mr. ADAMS. Mr. Speaker, I thank the chairman. I think the gentleman from Tennessee explained it very well and I wanted to confirm that again.

Mr. Speaker, I would be very happy to answer any questions, but basically the House bill was followed. As the gentleman from Tennessee stated, we removed from the bill the maximum items. I hope the conference report will be adopted.

Mr. KUYKENDALL. Mr. Speaker, will the gentleman yield?

Mr. STAGGERS. Mr. Speaker, I yield to the gentleman from Tennessee.

Mr. KUYKENDALL. Mr. Speaker, I would like to ask the gentleman from Washington to clarify one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal court had the key to the Treasury. Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?

Mr. ADAMS. Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress, to be signed by the President. It is defined as a joint resloution [sic] in the bill, and the statement of the managers, and it was the clear intent of the managers that any amount other than common stock was to be at the lowest possible limit to meet the constitutional guarantees.

Mr. KUYKENDALL. Mr. Speaker, is it not true, I will ask the gentleman from Washington (Mr. Adams) that the creditors, of course, are given

protection, and that the Board of Directors, under the control of Government officials, is the owner of the entire block of stock of 100 million shares, whatever it is?

Mr. ADAMS. The gentleman is correct. It is controlled by the United States, so long as the Secretary determines that there is an amount of obligation funds which the United States might, in any way ever, have to have anything to do with.

During that period of time, it is controlled by a board of directors which consists of Government officials.

Mr. KUYKENDALL. There is no way the Federal court may assess the taxpayers or this Congress on the judgments of the creditors: is that correct?

Mr. ADAMS. The gentleman is correct.

Mr. KUYKENDALL. There is no way they can assess the Congress for the money?

Mr. ADAMS. The gentleman is correct.

Mr. KUYKENDALL. Mr. Speaker I yield myself such time as I may consume.